UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

ELAINE TIMMERMAN, BERNICE ERICKSON, BURTON DePRIEST and DANIEL BOLHUIS, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

TOMMY THOMPSON, as Secretary of the Department of Health and Human Services, and CENTERS FOR MEDICARE AND MEDICAID SERVICES,

Defendants.

Civil No. 03-5221 (JRT/FLN)

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Paul R. Dahlberg and Andrew L. Davick, MESHBESHER & SPENCE, LTD., 21 S.W. Second Street, Suite 300, Rochester, MN 55902 and Anthony J. Nemo, MESHBESHER & SPENCE, LTD., 1616 Park Avenue South, Minneapolis, MN 55404, for plaintiffs.

Mary L. Trippler, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, 600 United States Courthouse, 300 South Fourth Street, Minneapolis, MN 55415, for defendants.

Plaintiffs Elaine Timmerman, Bernice Erickson, Burton DePriest, and Daniel Bolhuis ("plaintiffs") all were injured by third parties and have or, in the case of Erickson, will receive settlement payments to compensate them for their injuries. Each received medical care related to their injuries that were paid for by Medicare. Medicare notified each of the plaintiffs that it is entitled to reimbursement of its payments from the

settlements received by plaintiffs. Plaintiffs dispute that Medicare is entitled to reimbursement from third-party tort settlements and have brought suit against defendants, the Secretary of the Department of Health and Human Services and Centers for Medicare and Medicaid Services, for declarative and injunctive relief, as well as for damages. Defendants move to dismiss for lack of jurisdiction, contending that the Medicare Act requires plaintiffs to exhaust their administrative remedies before proceeding in federal court. Plaintiffs admit they have not exhausted their administrative remedies, but argue that the present matter falls within an established exception to the exhaustion rule. For the following reasons, the Court grants defendants' motion to dismiss.

I. THE MEDICARE AS SECONDARY PAYER STATUTE[1]

Congress established the Medicare program, administered by the Department of Health and Human Services through the Centers for Medicare and Medicaid Services, in 1965 to pay the medical expenses of the elderly, disabled, and those suffering from end stage renal failure. 42 U.S.C. §§ 1395 *et seq*. Initially, Medicare paid essentially all expenses of eligible participants. *See* Social Security Amendments of 1965, Pub. L. No. 89-97, § 1862(b), 79 Stat. 286. However, beginning in 1980, Congress enacted a series of amendments known as the Medicare Secondary Payer ("MSP") provisions. These

[1] This summary reflects Congress' recently enacted technical and clarifying amendments to the Medicare as Secondary Payer provisions. *See* Medicare Prescription Drug, Improvement and Modernization Act of 2003, Pub. L. 108-173 § 301. Congress designated the clarifying amendments effective as if enacted as part of the Omnibus Reconciliation Act of 1980, Pub. L. 96-499 (effective December 5, 1980). *Id.*, § 301(d)(1)-(2). The Court notes that plaintiffs dispute the retroactive application of these amendments, and the Court does not mean by this summary to in any way rule on that dispute. Whether these amendments are in fact retroactive and how they affect plaintiffs' claims in this case would be matters to be decided in conjunction with the merits of the case.

amendments, codified at 42 U.S.C. § 1395y(b), were designed to reign in Medicare spending and preserve the fiscal integrity of the Medicare system, while still ensuring that eligible beneficiaries received the necessary care. *See Health Ins. Ass'n of America, Inc. v. Shalala*, 23 F.3d 412, 414 (D.C. Cir. 1994) (discussing history of Medicare); *accord United States v. Baxter Int'l, Inc.*, 345 F.3d 866, 888-89 (11th Cir. 2003).

There are two basic parts to the Medicare Secondary Payer provisions, found at 42 U.S.C. § 1395y(b)(2)(A) and (B). Section (A) provides that Medicare may not make payment if "payment has been made or can reasonably be expected to be made under a workmen's compensation law or plan of the United States or a State or under an automobile or liability insurance policy or plan (including a self-insured plan) or under no fault insurance." 42 U.S.C. § 1395y(b)(2)(A)(ii). "An entity that engages in a business, trade, or profession shall be deemed to have a self-insured plan if it carries its own risk (whether by a failure to obtain insurance, or otherwise) in whole or in part." *Id.*

Section (B), however, permits Medicare to make payments otherwise prohibited under § (b)(2)(A) "conditioned on reimbursement to the appropriate Trust Fund" in cases where a plan described in § (A)(ii) "has not or cannot reasonably be expected to make payment . . . promptly." 42 U.S.C. § 1395y(b)(2)(B)(i). "Promptly" is defined as within 120 days of the earlier of either the date care was provided or the date a claim was filed with the insurer. 42 C.F.R. §§ 411.21, 411 50. The provisions create various means for the United States to recover reimbursement payments due to the Trust Funds and permit the imposition of specific penalties (such as collection of double the owed amount)

against parties that fail to reimburse. *See* 42 U.S.C. §1395y(b)(2)(B)(ii), (iii), (iv), and (v).

Plaintiffs' substantive claims relate to these provisions. Specifically, plaintiffs claim that (a) Medicare may only seek reimbursement from plans that are reasonably expected to pay promptly and (b) a third party tort settlement is not a "plan" from which reimbursement may be sought. The merits of plaintiffs' claims are not yet at issue. Defendants assert that the Medicare Act requires plaintiffs to exhaust all administrative remedies before review is available in a court and contend that plaintiffs' failure to do so deprives this Court of jurisdiction over the matter. Defendants have brought a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1).

II. STANDARD OF REVIEW UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(B)(1)

Federal Rule of Civil Procedure 12(b)(1) permits a defendant to file a motion to dismiss for "lack of jurisdiction over the subject matter." In determining whether jurisdiction exists, the Court is "free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Osborn v. United States*, 918 F.2d 724, 729-30 (8th Cir. 1990) (citations omitted). It is the plaintiff's burden to establish that jurisdiction does in fact exist. *Id.* If the Court finds that jurisdiction is not present, it is obligated to dismiss the matter. Fed. R. Civ. P. 12(h); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583-84 (1999).

III. JURISDICTION UNDER 42 U.S.C. § 405(g) AND (h)

The Medicare Act and related regulations create a detailed administrative review process through which claims for reimbursement are to be disputed. *See* 42 U.S.C. § 1395ff(b)(1); *see also Fanning v. United States*, 346 F.3d 386, 400-01 (3rd Cir. 2003) (describing review process). After receiving an unfavorable initial determination from the agency, a beneficiary may request reconsideration of the agency's decision, then request a hearing before an Administrative Law Judge ("ALJ") to appeal the agency's renewed decision, and finally request a review of the ALJ's decision by the Departmental Appeal Board. *Id.*; *Heckler v. Ringer*, 466 U.S. 602, 606 (1984). Once the beneficiary has completed the administrative review process and the agency has issued a "final decision," the beneficiary may file an action for further review in federal district court. *Id.*; 42 U.S.C. § 405(g); *Heckler*, 466 U.S. at 405-06. 42 U.S.C. § 405(h), which is incorporated into the Medicare Act by 42 U.S.C. 1395ii, provides that "[n]o findings of fact or decision of the [Secretary] shall be reviewed by any person, tribunal, or governmental agency except as herein provided" – i.e. by § 405(g).

The United States Supreme Court has recognized this language as creating a jurisdictional bar plaintiffs must meet before their claims are properly brought before the court. *Weinberger v. Salfi*, 422 U.S. 749, 764 (1975) ("We interpret the first requirement [a final decision of the Secretary made after a hearing], however, to be central to the requisite grant of subject-matter jurisdiction"); *accord Heckler*, 466 U.S. at 614-15; *Anderson v. Sullivan*, 959 F.2d 690, 692 (8th Cir. 1992) (The Medicare Act "precludes general federal subject matter jurisdiction until administrative remedies have been

exhausted"). Section 405(h) "demands the 'channeling' of virtually all legal attacks through the agency." *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 13 (2000). Therefore, "[g]enerally, a [plaintiff] who fails to exhaust its administrative remedies will be precluded from seeking relief in federal court." *In Home Health, Inc. v. Shalala*, 272 F.3d 554, 559 (8th Cir. 2001) (citations omitted).

IV. WAIVER OF ADMINISTRATIVE EXHAUSTION

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court determined that the "final decision" requirement of § 405(g) "consists of two elements, only one of which is purely 'jurisdictional' in the sense that it cannot be waived by the Secretary in a particular case. The waiveable element is the requirement that the administrative remedies prescribed by the Secretary be exhausted. The nonwaiveable element is the requirement that a claim for benefits shall have been presented to the Secretary."[2] *Bowen v. City of New York*, 476 U.S. 467, 483 (1986) (quoting *Mathews*, 424 U.S. at 328). While deference to the Secretary's decision to waive or not to waive the exhaustion requirement is ordinarily appropriate, a judicial "waiver of administrative exhaustion . . . may occur under exceptional circumstances." *Titus v. Sullivan*, 4 F.3d 590, 592 (8th Cir. 1993); *Bowen*, 476 U.S. at 483; *Heckler*, 466 U.S. at 618.

In determining whether waiver is appropriate, the Court considers whether the claimant demonstrates "(1) their claims to the district court are collateral to their claim of benefits; (2) that irreparable injury will follow; and (3) that exhaustion will otherwise be

[2] The Court assumes, without deciding, that plaintiffs have satisfied the presentment requirement.

futile." *Titus*, 4 F.3d at 592 (citing *Bowen*, 476 U.S. at 467); *see also Heckler*, 466 U.S. at 618. Defendants argue that all three factors must be shown before waiver is appropriate. Plaintiffs, on the other hand, contend that a showing of any one of the factors is sufficient.

Both parties find support for their positions in the case law. The Ninth Circuit requires a showing of all three factors. *See Kaiser v. Blue Cross of California*, 347 F.3d 1107, 1115 (9th Cir. 2003); *Briggs v. Sullivan*, 886 F.2d 1132, 1139 (9th Cir. 1989). Other circuits, on the other hand, have noted that "no one element is critical to the resolution of the exhaustion issue; rather, a more general approach, balancing the competing considerations to arrive at a just result, is in order." *Pavano v. Shalala*, 95 F.3d 147, 151 (2nd Cir. 1996) (citations omitted); *see also Tataranowicz v. Sullivan*, 959 F.2d 268, 274 (D.C. Cir. 1992) (a very strong showing of futility or some combination of the elements will justify waiver of exhaustion).

The question has not been conclusively resolved by the Eighth Circuit. *Compare Titus*, 4 F.3d at 592 (listing collaterally, irreparable harm, and futility) *with In Home Health*, 272 F.3d at 560 (listing collaterally, irreparable harm, or futility). However, the Court notes that, with the exception of *In Home Health*, other Eighth Circuit cases have presented the three factors with the conjunctive "and." *See, e.g., Clarinda Home Health v. Shalala*, 100 F.3d 526, 531 (8th Cir. 1996); *Schoolcraft v. Sullivan*, 971 F.2d 81 (8th Cir. 1992). This Court need not attempt to resolve this issue because even under the more flexible, balancing approach, the Court finds that plaintiffs have not met their burden of demonstrating that waiver is appropriate in this instance.

A. Futility

Plaintiffs argue that further resort to the administrative process is futile because the Secretary has already established a position contrary to their claim.[3] However, the "futility" prong is not exclusively focused on the availability or likelihood of relief to the plaintiffs through the administrative process. *See Heckler*, 466 U.S. at 616-17; *Lifestar Ambulance Serv., Inc. v. United States*, 365 F.3d 1293, __ (11th Cir. 2004) (*citing Illinois Council*, 529 U.S. at 23-24); *but compare Tataranowicz*, 959 F.2d at 274. Rather, the futility prong addresses whether pursuit of relief through the administrative process will "serve the purposes of exhaustion, and not be futile in the context of the system." *Kaiser*, 347 F.3d at 1115. "Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review." *Id.* (*quoting Salfi*, 422 U.S. at 765).

---

[3] In support of this argument, plaintiffs point to *Brown v. Thompson*, a case in the Eastern District of Virginia that also involved MSP reimbursement from tort settlements. In *Brown v. Thompson*, the district court refused to dismiss for failure to exhaust administrative remedies because it found that further pursuit of relief through the administrative process would have been futile for the plaintiffs. *See* 252 F. Supp. 2d 312, 315 n.2 (E.D. Va. 2003). In so finding, the court in *Brown v. Thompson* relied on two cases: *Thetford Props. IV Ltd. P'ship v. U.S. Dept. of Housing and Urban Dev.*, 907 F.2d 445, 450 (4th Cir.1990) and *Randolph- Sheppard Vendors of America v. Weinberger*, 795 F.2d 90, 105-06 (D.C. Cir.1986). Both cases, however, involved a waiver of the usual administrative exhaustion doctrine, rather than the stricter, statutorily mandated exhaustion requirement found in the Medicare Act. *See Salfi* 422 U.S. at 756-59 and 763-66 (discussing difference between exhaustion doctrine and Medicare's statutory exhaustion requirement). Thus, despite the factual similarities between *Brown v. Thompson* and the instant matter, the Court does not find the ruling concerning futility persuasive.

In *Heckler*, the Supreme Court found that the Secretary's formal, binding ruling that a particular surgery could not be covered by Medicare did not render pursuit of relief through the administrative process futile for plaintiffs seeking coverage of that particular surgery. 466 U.S. at 616-17. The Supreme Court has also determined that claims beyond the Secretary's authority, such as constitutional challenges, must nevertheless proceed through the administrative process before receiving judicial review. *Illinois Council*, 529 U.S. at 23-24; *Salfi*, 422 U.S. at 760; *but compare Mathews*, 424 U.S. at 330-32. Thus, the mere fact that a plaintiff is unlikely to receive the relief he seeks through the administrative process does not render exhaustion futile. "The policies favoring exhaustion are most strongly implicated by actions challenging the application of concededly valid regulations." *Abbey v. Sullivan*, 978 F.2d 37, 45 (2nd Cir. 1992) (quoted in *Pavano v. Shalala*, 95 F.3d 147, 150 (2nd Cir. 1996)); *see also Bowen*, 476 U.S. at 484-85 ("mere deviation from the applicable regulations . . . [is] fully correctable upon subsequent administrative review since the claimant on appeal will alert the agency to the alleged deviation").

In this case, plaintiffs do not challenge the lawfulness of the MSP provisions. Rather, plaintiffs dispute the interpretation of the MSP provisions that finds the provisions applicable to plaintiffs' particular situations. Although it appears unlikely that the plaintiffs will succeed in obtaining an administrative ruling that Medicare may not collect reimbursement from their tort settlements, exhaustion of the process will provide other benefits. Specifically, it will provide the reviewing court a complete record, including the reasoned opinion of an ALJ and, possibly, the Appeals Board, detailing the

Secretary's position. Further, it provides the agency with an opportunity to correct itself, a position that may in fact be encouraged by, among other things, further development of the factual record concerning the nature of the settlements. Therefore, the Court finds that requiring plaintiffs to exhaust their administrative remedies in this case is not futile.

B. Irreparable Harm

In order to demonstrate irreparable harm, a plaintiff must demonstrate that "deferment of judicial review until exhaustion of administrative remedies would cause them injury that cannot be remedied by later payment of the benefits requested." *Martin v. Shalala*, 63 F.3d 497, 505 (7th Cir. 1995); *see also Manakee Prof'l Med. Transfer Serv., Inc. v. Shalala*, 71 F.3d 574, 581 (6th Cir. 1995) (*citing Mathews*, 424 U.S. at 331). The Supreme Court has found that requiring exhaustion may cause irreparable hardship where the plaintiff is entirely dependent on the benefits he requests. *Mathews*, 424 U.S. at 331. Similarly, the Eighth Circuit has found irreparable harm where a delay of judicial review would also result in delay of "income required to secure basic necessities." *Titus*, 4 F.3d at 593.

This case differs significantly. Although the plaintiffs may be older and on fixed incomes, they are not required to make payments out of their fixed income and are not denied benefits until their cases are resolved. Medicare has already paid their medical claims, and merely seeks reimbursement out of the settlement awards. Further, three of the four plaintiffs have already repaid Medicare most or all of the requested reimbursements and are therefore not, at this point, threatened with withholding of any

other benefits payments they may rely on for life's necessities.[4] While the Court sympathizes with plaintiffs' frustration with the drawn out nature of the administrative process, such frustration does not qualify as irreparable harm. The Supreme Court has observed that "insofar as [§ 405(h)] demands the channeling of virtually all legal attacks through the agency," it necessarily creates some cases of "individual delay-related hardship." *Illinois Council*, 529 U.S. at 13. However, because it "assures the agency greater opportunity to apply, interpret, or revise policies, regulations, or statutes without possibly premature interference by different individual courts applying ripeness and exhaustion exceptions case by case," Congress has judged that "paying this price may seem justified." *Id.* For the foregoing reasons, the Court finds that requiring plaintiffs to adhere to the exhaustion requirement will not cause them irreparable harm.

C. Collateral to claim for benefits

That a claim is presented as a constitutional challenge or something other than strictly a claim for benefits does not necessarily render it "collateral to" a claim for benefits. *See Illinois Council*, 529 U.S. at 10. In *Bowen*, the Supreme Court found the plaintiffs' claim to be "wholly collateral" to a claim for benefits because it challenged defendants' wholesale failure to apply the applicable regulations. 476 U.S. at 483: *see also Titus*, 4 F.3d 590, 593 (8th Cir. 1993). The plaintiffs in *Bowen* alleged that the Secretary was, in every case, wrongfully making benefits determination based on a general listing of impairments rather than individual assessments. 476 U.S. 473-74.

[4] The fourth plaintiff has not received a settlement yet, and defendants will not seek reimbursement until that happens.

Thus, each plaintiff was being denied the correct process, but receiving the correct process might or might not affect the outcome of his or her case. *Id.* at 485-86. *Bowen* is distinguishable from a case in which the plaintiffs challenge the allegedly erroneous application of the proper regulations. *Id.* at 485; *see also Manakee*, 71 F.3d at 580; *Martin*, 63 F.3d at 504. In the latter circumstance, resolution of the matter might either result immediately in an award of benefits or, as in *Heckler*, leave "only essentially ministerial details . . . before [plaintiffs] would receive benefits." 466 U.S. at 615.

The Court is not persuaded by plaintiffs' assertion that this case does not involve a claim for benefits. In this case, as in *Heckler*, if plaintiffs prevail on their claims for declaratory and injunctive relief to the effect that the Secretary is not entitled to reimbursement from their settlements payments, essentially only ministerial details will remain before they are granted, in this case, repayment of their benefits. For the plaintiff and potential class members who have not reimbursed Medicare pending outcome of this suit, an award of the declaratory and injunctive relief requested would result in an immediate grant of the right to enjoy the benefits they have already received from Medicare. Regardless of when plaintiffs received their benefits from Medicare, this action addresses whether and to what degree plaintiffs are entitled to those benefits. The Court finds that plaintiffs' claims in this action cannot be considered "wholly collateral" to a claim for benefits.

V. CONCLUSION

The Court sympathizes with plaintiffs' frustration at the delay in resolution of their claims that will result from being required to proceed through the administrative process, especially when it appears likely that they will eventually end up back before a court. The Court also agrees that the question of statutory interpretation presented by plaintiffs is an important one, which likely will require resolution by a court. However, as none of the three factors weigh strongly in plaintiffs' favor, the Court finds that waiver of the administrative exhaustion requirement is not appropriate, and that this Court therefore does not have jurisdiction under § 405(h) to consider plaintiffs' claims.[5] The Court therefore grants defendants' motion to dismiss.

---

[5] The complaint also alleges that jurisdiction is proper pursuant to 28 U.S.C. §§ 1331 (federal question), 1361 (mandamus), and 2201-02 (the Declaratory Judgment Act). The Court finds that none are appropriately applied in this case.

"Judicial review under the federal-question statute, 28 U.S.C. § 1331, is precluded by 42 U.S.C. § 405(h)." *Your Home Visiting Nurse Services, Inc. v. Shalala*, 525 U.S. 449, 456 (1999).

Mandamus is "intended to provide a remedy for a plaintiff only if he has exhausted all other avenues for relief and only if the defendant owes him a clear nondiscretionary duty." *Great Rivers Home Care, Inc. v. Thompson*, 170 F. Supp. 2d 900, 906 (E.D. Mo. 2001) (citing *Heckler*, 466 U.S. at 616-17). As noted above, none of the plaintiffs have exhausted their administrative remedies. Further, whether to seek reimbursement for particular Medicare payments is a discretionary decision on the part of the Secretary. *See* 42 U.S.C. § 1395gg(c) (permitting Secretary to waive claim for reimbursement). Thus, plaintiffs are not entitled to mandamus relief.

The Declaratory Judgment Act does not provide an independent basis for jurisdiction. *Hatridge v. Aetna Casualty & Surety Company*, 415 F.2d 809, 812 (8th Cir. 1969).

ORDER

Based on the foregoing, all the records, files, and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Defendants' Motion to Dismiss Amended Complaint [Docket No. 4] is **GRANTED**.

2. Plaintiffs' Amended Class Action Complaint [Docket No. 2] is **DISMISSED WITH PREJUDICE**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: August 5, 2004
at Minneapolis, Minnesota.

s/ John R. Tunheim
JOHN R. TUNHEIM
United States District Judge